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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

WILLIE LEE RICHMOND,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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TABLE OF CONTENTS

CITATIONS

TABLE OF CONTENTS

(Continued) PAGES

TABLE OF CONTENTS

(Continued) PAGES

QUESTIONS PRESENTED

I. IS ARIZONA'S AGGRAVATING CIRCUMSTANCE OF "ESPECIALLY HEINOUS AND DEPRAVED" UNCONSTITUTIONAL, EITHER ON ITS FACE OR AS APPLIED TO THIS CASE, WHERE A MAJORITY OF THE ARIZONA SUPREME COURT FOUND THAT THIS FACTOR COULD NOT BE SAID TO EXIST?

II. MAY THE DEATH PENALTY BE IMPOSED WHEN THE TRIAL COURT DOES NOT MAKE A FINDING AS TO THE EXISTENCE OF SIGNIFICANT MITIGATING EVIDENCE, WHEN SUCH EVIDENCE WAS UNCONTRADICTED AND CORROBORATED AT THE SENTENCING HEARING?

III. WHEN ONE MEMBER OF THE STATE SUPREME COURT DETERMINES THAT THE DEATH PENALTY SHOULD NOT BE IMPOSED, IS THE FEDERAL CONSTITUTION VIOLATED WHEN THE STATE CONSTITUTION REQUIRES UNANIMOUS JURY VERDICTS AND THE STATE SUPREME COURT IS SITTING AS A BODY INDEPENDENTLY REVIEWING THE PROPRIETY OF IMPOSITION OF THE DEATH PENALTY?

CITATION OF OPINION BELOW

State of Arizona v. Willie Lee Richmond, ___ Ariz. ___, 666 P. 2d 57 (1983), motion for rehearing denied June 29, 1983. Warrant of Execution issued on July 5, 1983. Application for extension of time to file petition for certiorari to the United States Supreme Court granted by Justice Rehnquist on July 18, 1983, extending time until September 26, 1983.

A copy of the opinion from which the instant petition for certiorari is sought is appended hereto as Appendix A.

Prior opinion in this case is found in State v. Richmond, 114 Ariz. 186, 560 P. 2d 41 (1976), cert den. 433 U.S. 915, 97 S. Ct. 2988, 53 L. Ed. 2d 1101 (1977). The instant petition is taken from resentencing to death following the Arizona Supreme Court's declaration that Petitioner's original death sentence was unconstitutional under State v. Watson, 120 Ariz. 441, 586 P. 2d 1253 (1978), cert den. 440 U.S. 924, 99 S. Ct. 1254, 59 L. Ed. 2d 478 (1979).

STATEMENT OF JURISDICTION

This petition for certiorari is taken from the Arizona Supreme Court's resentencing of Petitioner to death. The Arizona Supreme Court denied Petitioner's motion for rehearing and issued a warrant of execution for September 7, 1983. Petitioner's execution was stayed by order of Justice Rehnquist on August 17, 1983 pending disposition of the instant petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Amends. V, VI, VIII, XIV

ARIZ. REV. STAT. § 13-703 See Appendix C

ARIZ. CONST., Art. 2, § 23

STATEMENT OF THE CASE

The history of this case is as follows:

1. Petitioner was originally convicted of first degree murder, and his conviction and sentence of death were affirmed by the Arizona Supreme Court. State v. Richmond, 114 Ariz. 186, 560 P. 2d 41 (1976), cert. den. 433 U.S. 915, 97 S. Ct. 2988, 53 L. Ed. 2d 1101 (1977).

2. Petitioner's death sentence was vacated, and a resentencing ordered, when Arizona Supreme Court declared Arizona's death penalty statutes to be violative of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) because the trier of fact in Arizona was not permitted to consider all mitigating factors in assessing the propriety of imposition of the ultimate penalty. State v. Watson, 120 Ariz. 441, 586 P. 2d 1253 (1978). cert den. 440 U.S. 924, 99 S. Ct. 1254, 59 L.Ed. 2d 478 (1979).

3. Petitioner was resentenced to death, and, in the opinion attached hereto as Appendix A, a divided Arizona Supreme Court affirmed that sentence.

4. In so doing, three of the five justices of the Arizona high court declared that the sentencing judge erred in determining that the murder in the instant case was committed in an "especially heinous" manner, an aggravating circumstance under A.R.S. § 13-703(F)(6). See Exhibit C, infra. The two justices authoring the plurality opinion believed that

Petitioner's actions were "especially heinous," and, that the trial court could also have found them to be "especially depraved" under the same statute. This, combined with Petitioner's convictions for another first degree murder and kidnapping, justified imposition of the death penalty in the plurality opinion, which had the concurrence of two of the justices who disagreed about the establishment of the "especially heinous" aggravating circumstance.

5. The fifth justice of the Court disagreed with the other four and dissented from affirmance of the death penalty, declaring that the uncontradicted, corroborated evidence at resentencing showed that Petitioner had used his years on death row in an exemplary fashion, and that executing Petitioner at this point would serve no valid societal purpose:

> The theme which ran through all of the testimony at the sentence hearing was that defendant had changed remarkably since he had arrived at prison six years previously. The witnesses believed that defendant's attitude had improved materially, that he had found a purpose in life and now had a genuine desire to better himself, and, more important, to help others. There seemed to be no question but that this desire to help others was more than subjective; it was actually carried into effect. Richmond, supra, at 666 P. 2d 69. (Feldman, J., dissenting).

7. Petitioner raised the issues set forth in this petition at the state trial court level at the time of resentencing, then asserted these issues in his appeal to the Arizona Supreme Court.

8. Petitioner's request on this petition is for an order reducing his death sentence in life in prison, to be served consecutively to the life sentence currently imposed

upon him for the other first degree murder conviction used by the Arizona Supreme Court as an aggravating circumstance. See Richmond, supra, at 666 P. 2d 71. In short, Petitioner recognizes that he will never leave prison, but requests that this Court grant him a full measure of life in prison, so that he may continue in the fashion depicted by the uncontradicted testimony at his resentencing and as noted by Justice Feldman in his dissent from imposition of the death penalty.

REASONS FOR GRANTING THE WRIT

A. THE UNIQUENESS OF PETITIONER'S CASE

This is a case which the majority of the Arizona Supreme Court concluded was "not above the norm of first degree murders," Richmond, supra, at 666 P. 2d at 68, yet Petitioner now faces the death penalty no less than those whose crimes the state high court unanimously believed merited such a sentence.

In Arizona, A.R.S. § 13-706(F)(6) establishes as an aggravating circumstance for imposition of the death penalty the fact that the murder was committed in an "especially heinous, cruel or depraved manner." While the aggravating circumstances which justify the death penalty have never been prioritized, and while a defendant can be put to death even if this aggravating factor is not established, the fact remains that the Arizona Supreme Court has often indicated that the "cruel, heinous" standard is the one which separates a death-penalty case from a "normal" first degree murder. State v. Jeffers, ___ Ariz. ___, 661 P. 2d 1105, 1131 (1983); State v. Gretzler, 135 Ariz. 42, 659 P. 2d 1, 12 (1983); State v. Zaragoza, 135 Ariz. 63, 659 P. 2d 22, 28 (1983);

State v. Ceja, 126 Ariz. 35, 612 P. 2d 491 (1980).[1]

The majority in this case believed that Petitioner's background, and, in particular, his prior conviction for first degree murder, justified imposition of the death penalty despite the fact that the particular crime now under review was not a death case. The manner in which this decision was reached, and the failure to utilize the remarkable change in Petitioner's character during his years on death row, render this conclusion contrary to the Constitution. It was in fact precisely the existence of corroborated, uncontradicted evidence of Petitioner's character development which prompted the dissent from Justice Feldman.

Prior to discussing the constitutional issue raised in this petition, several other factors should be noted. The Arizona Supreme Court, prior to the opinion from which certiorari is now being sought, has never indicated that it believed Petitioner's crime was committed in an "especially heinous, cruel or depraved" manner, indicating in its earlier opinion affirming the death penalty that it did not have to reach that particular question. State v. Richmond, 114 Ariz. 186, 196-197, 560 P. 2d 41, 51-52 (1976).

As noted on review in the instant case, the majority of the Arizona Supreme Court determined that Petitioner's crime was not "especially heinous, cruel, or depraved," and concluded therefore that his case is "not above the norm of first

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[1] Petitioner is aware of only four Arizona cases in which the death penalty was imposed and some portion of the "cruel, heinous" aggravating circumstance was not found by the sentencing court or the Arizona Supreme Court. See State v. Blazak, 131 Ariz. 598, 643 P. 2d 694 (1982); State v. Schad, 129 Ariz. 557, 633 P. 2d 366 (1981); State v. Arnett, 125 Ariz. 201, 608 P. 2d 778 (1980); State v. Holsinger, 115 Ariz. 89, 563 P. 2d 888 (1977).

degree murders." Richmond, supra, at 666 P. 2d 68.

Moreover, to the best of Petitioner's knowledge his is the first case in Arizona history in which a majority of the Arizona Supreme Court felt that this important aggravating factor was not properly found by the trial court and yet still affirmed imposition of the death penalty. In every other case in which either "especially heinous, cruel, or depraved" was rejected by the state supreme court, the death penalty was likewise rejected and a life sentence ordered, despite the fact that in at least two such cases other aggravating factors were deemed to exist. See State v. Watson, 129 Ariz. 60, 628 P. 2d 943 (1981); State v. Madsen, 125 Ariz. 346, 609 P. 2d 1046, cert. den. 449 U.S. 973 (1979); State v. Lujan, 124 Ariz. 365, 604 P. 2d 629 (1979); State v. Brookover, 124 Ariz. 38, 601 P. 2d 1326 (1979) (in which another aggravating circumstance was found to exist but the death penalty was still overturned).

The Watson decision, as noted by Justice Feldman in his dissent in the instant case, seems to almost demand imposition of a life sentence in Petitioner's case. In Watson, the Arizona Supreme Court found that two aggravating factors identical to those found in Petitioner's case and based on Watson's prior robbery conviction, were properly found by the trial court conducting the sentencing. However, due in large part to mitigating evidence of Watson's behavior in prison which closely paralleled the evidence introduced by Petitioner in this case, the Court held that the death penalty was not justified and imposed a life sentence.

There is thus established in this case a critical disagreement amongst the justices of the Arizona Supreme Court about the existence of the one aggravating factor which

the Court has said separates "normal" first degree murder cases from death penalty cases. Moreover, this is the first case in Arizona history in which one of the justices believed that imposition of the death penalty was improper, and therefore dissented from affirmance of the sentence and did not sign the warrant of execution. (See Appendix B, supra). While Justice Feldman's dissent sounds in many areas, the bottom line goes to the heart of the issue--despite Petitioner's criminal background, the uncontradicted, corroborated evidence in this case soundly demonstrates that he is not the sort of person for whom the death penalty is reserved.

It is therefore in light of the truly unique posture of this case that the constitutional issues presented in this petition must be examined.

B. APPLICATION OF ARIZONA'S AGGRAVATING CIRCUMSTANCE OF "ESPECIALLY HEINOUS AND DEPRAVED" IS UNCONSTITUTIONALLY BROAD AND VAGUE

In Gregg v. Georgia, 428 U.S. 153 at 188-190, 96 S. Ct. 2909 at 2932, 49 L. Ed. 2d 859 at 883 (1976), this Court held it a violation of the Eighth and Fourteenth Amendments to enact the death penalty where the State's sentencing procedures do not provide for a sufficiently narrow construction of the death penalty to make sentencing discretion "suitably directed and limited."

In Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), this Court overturned the death penalty based on a recognition that Georgia's aggravating circumstance of "outrageously or wantonly vile, horrible and inhuman" was applied in an unconstitutionally overbroad and vague fashion in that particular case.

In State v. Gretzler, 135 Ariz. 42, 659 P. 2d 1 at 9

(1983), the Arizona Supreme Court recognized that constitutional violations occur when the application of a statutory aggravating circumstance is not sufficiently narrowed by the state court to provide for suitable sentencing discretion, or when "the state tribunal may stray in an individual case from an otherwise constitutionally narrow construction."

Petitioner submits that his case demonstrates that the "especially heinous, cruel or depraved" aggravating circumstance of A.R.S. § 13-706(F)(6) violates the Fifth, Eighth and Fourteenth Amendments as being vague and overbroad on its face, as well as in its application in the instant case. Because the application of this standard to the facts of his case reveals constitutional infirmities under both Gregg and Godfrey, Petitioner will begin this discussion with the constitutional violation inherent in the application of the standard to his individual situation

1. The application of the "especially heinous" standard is violative of the Eighth and Fourteenth Amendments under Godfrey.

The trial judge who sentenced Petitioner to death originally found that the crime was committed in an "especially cruel and heinous" manner. A.R.S. § 13-706(F)(6).[1]

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[1] The Arizona Supreme Court has defined "especially heinous, cruel or depraved as follows:

"heinous: hatefully or shockingly evil; grossly bad. (refers to Defendant's state of mind).

cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner (refers to pain suffered by victim).

depraved: marked by debasement, corruption, perversion or deterioration. (refers to Defendant's state of mind)." State v. Gretzler, ___ Ariz. ___, 659 P. 2d 1, 10 (1983); State v. Knapp, 114 Ariz. 531, 543, 562 P. 2d 704, 716 cert. den. 435 U.S. 908 (1977).

The Arizona Supreme Court plurality determined in this case that the trial court erred in its "especially cruel" finding, since under prior Arizona caselaw there was no evidence in this case that the victim suffered undue pain before death, the required definition of "especially cruel." State v. Gretzler, supra.

The plurality also found, however, that the crime was committed in "an especially heinous" manner, and that the trial court could have found it to have been committed in an "especially depraved" manner as well. The two justices holding this opinion indicated that the fact the victim was run over twice, each time from a different direction, established the particular state of mind required for this finding. Richmond, supra, at 666 P. 2d 64.

The majority of the Court, however, disagreed with this finding, holding that prior Arizona caselaw demonstrated that the acts in this case could not fit in any fashion under the definitions of A.R.S. § 13-706(F)(6).

The reasoning and analysis of prior Arizona caselaw which the majority undertook, see Richmond, supra, at 666 P. 2d 66-69, closely parallels the analysis by this Court in Godfrey in that in both cases comparison was made between prior cases in which the particular statutory aggravating factor was properly applied and its application in the case under review. See Godfrey, supra, at 446 U.S. 428-433. The conclusion reached by the majority of the Arizona Supreme Court in the instant case was that there was absolutely no evidence suggesting that the driver of the vehicle knew or should have known that the first pass over the victim crushed his skull and killed him. In other words, the majority

concluded that the evidence did not establish the necessary facts which would put Petitioner under the definitions of the aggravating circumstances at issue. Given the doubt amongst the Court on this point, Petitioner submits that application of this aggravating circumstance is unconstitutional. State v. Valencia, 132 Ariz. 24, 645 P. 2d 239 (1982).

Indeed, a comparison of the instant case with other Arizona death penalty cases demonstrates the high degree of error involved in this matter. In State v. Gerlaugh, 134 Ariz. 164, 654 P. 2d 800 (1982), supp. opinion 135 Ariz. 89, 659 P. 2d 642 (1983), the defendant had run his car over the victim several times, then exited the vehicle and stabbed the still-living victim some 30-40 times with a screwdriver. In its supplemental opinion upholding the death penalty, a unanimous Arizona Supreme Court held that the "especially heinous, cruel or depraved"aggravating circumstance was clearly established.

In State v. Graham, ___ Ariz. ___, 660 P. 2d 460 (1983), the Court rejected the trial court's finding that the defendant acted in an "especially heinous or depraved" fashion, despite evidence from witnesses that the defendant smiled as he told them that the victim "squealed like a rabbit when shot." Because of the alleged immaturity of the defendant and his denial of the statement, the Court determined that the aggravating circumstances was not established and vacated the death penalty in favor of a life sentence.

Unlike Gerlaugh, where the evidence clearly demonstrated that the defendant ran over the struggling victim several times with the vehicle, the evidence in this case showed that the victim died immediately after the car initially struck him.

In sharp constrast to both Gerlaugh and Graham, there is absolutely no evidence in this case that Willie Richmond acted with the state of mind appropriate for finding that he was "especially heinous or depraved" at the time of the murder. With this point, a majority of the Arizona Supreme Court agrees, so much so that the concurrence held that "this crime is therefore not above the norm of first degree murders." Richmond, supra, at 666 P. 2d at 68.

Thus, Petitioner submits that application of this aggravating circumstance to his case by the plurality constitutes a violation of Godfrey.

2. The aggravating circumstance is unconstitutionally broad and vague on its face as demonstrated by the application in this case.

In Gregg, this Court indicated that before a death penalty can pass constitutional muster, it must be shown that application of the statutory sentencing scheme is sufficiently narrowed to avoid arbitrary and capricious decision-making as to who should or should not receive the ultimate sentence.

Can there be any greater indication of the uncertainty and vagueness of Arizona's "especially heinous, cruel or depraved" aggravating factor than the history of its application in the instant case? The litany of different applications of this aggravating factor begins with the trial court's conclusion that the murder was "especially cruel and heinous."

All five justices of the Arizona Supreme Court, sitting as independent reviewers of the facts, agreed that the murder in this case is not "especially cruel." Two members felt it was "especially heinous," and probably "especially depraved."

Lacks agreement

The majority, however, believed that none of these factors were established, and that therefore Petitioner's crime did not rise above from the "norm" of first degree murders.

In Proffitt, supra, this Court approved application of Florida's standard of "especially heinous, atrocious or cruel." Proffitt, supra, at 428 U.S. 255-256, 49 L. Ed. 2d 924-925. In so doing, however, this Court was not faced with a situation as now exists in Arizona's application of a similar standard in this case. Indeed, as has been noted, Petitioner's is the first case in Arizona in which a majority of the state supreme court held that the aggravating factor was not established, yet still upheld the death penalty. In at least two cases, as set forth earlier, the Court vacated the death penalty after holding that the sentencing judge erred in finding this aggravating factor was established, despite the fact that there existed other factors which were properly found by the trial judge. State v. Watson, supra; State v. Brookover, supra.

Indeed, as noted by Justice Feldman in dissent in this case, a comparison of Petitioner's case with that of Watson demonstrates an undeniable conflict in even-handed application of this aggravating circumstance. Richmond, supra, at 666 P. 2d 69-71.

Petitioner therefore submits that this Court should, consistent with Godfrey and Gregg, order that the death penalty be reduced to life in prison. However, at the very least Petitioner submits that this matter be remanded for resentencing without this aggravating factor.

As has been noted, this particular aggravating circumstance carries special weight in Arizona's death penalty

sentencing scheme, since it is the factor which separates the death penalty case from that of a "normal" first degree murder. In State v. Gillies, ___ Ariz. ___, 662 P. 2d 1007 (1983), the Arizona Supreme Court found that three of the four aggravating factors found by the trial court were improper, and therefore decided that the matter must be remanded for resentencing despite the proper finding that the murder was "especially heinous, cruel or depraved."

Petitioner submits that even if the other aggravating factors in this case were properly demonstrated, resentencing is necessary because the one factor which elevates a "normal" first degree murder from an "abnormal" (and thus death-qualifying) murder was not constitutionally found. Obviously, if the Arizona Supreme Court believed it necessary to remand for resentencing in Gillies where this factor was said to have been correctly demonstrated, it is only logical that remand is required where the factor was not properly demonstrated. Petitioner therefore requests that his death sentence either be vacated to life or remanded for resentencing without the "especially heinous or depraved" finding.

C. THE DEATH PENALTY CANNOT CONSTITUTIONALLY BE IMPOSED WHEN THE SENTENCING COURT CANNOT MAKE A DEFINITIVE RULING AS TO THE ESTABLISHMENT OF SIGNIFICANT MITIGATING CIRCUMSTANCES, WHEN SUCH CIRCUMSTANCE IS SUPPORTED BY CORROBORATED, UNCONTRADICTED EVIDENCE

In Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), this Court held it unconstitutional for a trial judge, sitting on a death penalty sentencing, to refuse to consider as a matter of law mitigating evidence of the defendant's troubled background. See also Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

In this case, the trial court, while not precluding the

presentation of uncontradicted, corroborated evidence of Petitioner's remarkable change in character, concluded that he could not make a "definitive finding" as to whether such evidence established a mitigating circumstance.[1]

In its independent review, four justices on the Arizona Supreme Court concluded that the trial court did not err in not reaching a conclusion as to the establishment of the mitigating circumstance, and also decided that Petitioner's past criminal record and the fact that his character had changed "in a very controlled [prison] environment" permitted application of the death penalty. Richmond, supra, at 666 P. 2d 86. Petitioner submits that the Eighth and Fourteenth Amendments are violated when a sentencing judge fails to consider as a mitigating factor uncontradicted, corroborative evidence of the change in the defendant's character and that remand for resentencing is therefore required.

In State v. Watson, 129 Ariz. 60, 628 P. 2d 943 (1981), the Arizona Supreme Court held it a requirement under the Constitution and this Court's decisions in Godfrey and Gregg that such mitigating evidence be considered by the sentencing court. It was, indeed, such evidence which contributed to a large degree to the Court's decision to vacate the death sentence in Watson.

In the instant case, there is no question but that the evidence presented was uncontradicted--the only question was whether the sentencing judge could somehow disregard the evidence and fail to take such evidence into account in assessing the propriety of the death penalty. In Eddings,

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[1] A.R.S. § 13-703(g) provides that mitigating circumstances can include "any aspects of the defendant's character."

this Court clearly indicated that a trial court was not permitted to preclude, as a matter of law, the presentation of such evidence. Petitioner submits that the issue of whether the sentencing authority could permit such evidence to be presented and then fail to make a finding that the mitigation was established is fairly presented by this case.

In Eddings, this Court determined that the sentencer, and the reviewing state court, is permitted to determine the weight to be given to such mitigating evidence. Eddings, supra, at 455 U.S. 115-115, 71 L. Ed. 2d 11. However, in the instant case, despite the fact that the evidence was uncontradicted, the trial court decided that it could not accept such evidence as establishing the sought-after mitigation. This, Petitioner submits, presents a clear constitutional error, and leads to the arbitrary and discretionary application of the death penalty which Gregg and Godfrey sought to eliminate.

Indeed, when one reviews the rationale of the Arizona Supreme Court on this issue, the uncertainty inherent in the sentencing becomes more pronounced. In Watson, supra the Court concluded that the mitigating evidence of the defendant's character change was so persuasive that it contributed to a large part in the imposition of a life sentence rather than death. In the instant case, the Court reasoned that the fact Petitioner's character had changed while he was on death row was something which the trial court could fairly consider in determining that it could not reach a definitive conclusion as to the establishment of the mitigating factor.

What is immediately apparent, however, is that the same character change which so impressed the Court in Watson

occurred in precisely the same environment (i.e., death row) as that which the Court in the instant case deemed insufficient mitigation. Such inconsistency in the establistment of mitigation is precisely the evil which this Court has attempted to alleviate in cases such as Godfrey and Eddings.

It is also clear, of course, that Petitioner's prior murder conviction bore heavily on the Court's decision. However, as noted by Justice Feldman's dissent in this case, the failure to evaluate Petitioner's mitigating evidence, particularly when such evidence went to the heart of the question of the applicability of the death penalty to the particular person to be sentenced, presents an unavoidable constitutional problem. If the state supreme court gives great weight to Petitioner's past record, yet fails to adequately consider the change in his character, and even affirms the trial court's failure to make a definitive finding on this issue, how can it be said that the death penalty is being applied in an even-handed fashion?

This case squarely presents this issue. There is no evidence in this case, nor was any offered, which suggested that the defendant's change in character was not genuine, and indeed, as noted by Justice Feldman, the character change occurred well before Petitioner could have gained from such change, since the death penalty had not yet been overturned in Arizona. Richmond, supra, at 666 P. 2d 70. The evidence of Petitioner's change in character was uncontradicted and corroborated by several sources, including prsion guards and counselors. The trial court decided that it could not definitively accept such evidence, despite the fact that it was

uncontradicted. The Arizona Supreme Court affirmed this failure to make a decision, and did so for reasons that are not supportable. Under such circumstances, Petitioner submits that failure to consider such evidence as a mitigating factor requires this Court, as it did in Eddings, to remand this case for resentencing.

D. THE DEATH PENALTY IS UNCONSTITUTIONALLY APPLIED WHEN ONE MEMBER OF THE STATE SUPREME COURT, SITTING AS A BODY INDEPENDENTLY REVIEWING THE PROPRIETY OF THE SENTENCE, DISSENTS FROM AFFIRMANCE OF THE DEATH SENTENCE, WHEN THE STATE HAS A CONSTITUTIONAL PROVISION REQUIRING UNANIMOUS JURY VERDICTS

Article 2, § 23 of the Arizona Constitution provides, in pertinent part, that "In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."

While the Arizona Supreme Court is obviously not a jury per se, the fact remains that the Court has reserved for itself, in death penalty cases, a function which is akin to a trier of fact in determining factual issues and resolving the appropriate punishment from such resolution. The Court has indicated that it conducts an independent evaluation of the evidence in support of the finding by the sentencing judge that the death penalty is appropriate, a finding undertaken in the instant case. State v. Richmond, supra, at 666 P. 2d 65; State v. Blazak, 131 Ariz. 598, 643 P. 2d 694 (1982). This is consistent with A.R.S. § 13-703 which requires the sentencing judge to ascertain the propriety of the death penalty by examining the evidence in support of the various aggravating and mitigating factors, and then determining whether the death penalty is appropriate.

Petitioner submits that the result of the state supreme court's independent examination of the evidence in this case runs afoul of Arizona's constitutional requirement for

ter had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found that there were no mitigating circumstances sufficiently substantial to call for leniency.

We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances. Particularly we note the fact that this is not the first murder which appellant has perpetrated, as well as the gruesome manner in which this murder was committed. The death sentence is appropriate in this case.

PROPORTIONALITY REVIEW

[22] We stated in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), that we will conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*, 114 Ariz. at 196, 560 P.2d at 51. We have considered other cases in which the defendants robbed and murdered their victims and received the death penalty. *State v. Gretzler, supra; State v. Clark, supra; State v. Jordan, supra; State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Evans*, 120 Ariz. 158, 584 P.2d 1149 (1978), *sentence aff'd*, 124 Ariz. 526, 606 P.2d 16, cert. denied, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980). We find that the resolution in the instant case is not disproportionate to these cases.

Appellant likens his case to *State v. Watson* (II), 129 Ariz. 60, 628 P.2d 943 (1981), where we set aside the death sentence. Both cases involve a robbery and subsequent murder. Both defendants presented as mitigation evidence of a significant change in their character for the better, and both defendants received harsher sentences than their accomplices. However, the aggravating circumstances are very different in that the offense in *Watson* was not found to be especially heinous and depraved. Moreover, the defendant in *Watson* had only one prior conviction for robbery, while appellant in the instant case has prior convictions for both kidnapping and murder in separate incidents. Additionally, in *Watson* there were other compelling factors in mitigation—the age of the defendant (21) and the fact that the victim was armed and fired the first shot. We believe the differences in the cases are so significant that the different resolutions are necessary.

CONSTITUTIONAL CHALLENGES

[23] Appellant challenges the constitutionality of the Arizona death penalty statute claiming the statute, on its face and in application, is violative of the eighth amendment in that it allows for arbitrary and capricious determinations. We have previously considered and rejected this issue. *State v. Gretzler, supra; State v. Blazak, supra; State v. Richmond, supra.*

[24] The death penalty was challenged by appellant in a Rule 32 petition for post-conviction relief on the ground that in Arizona this penalty has been imposed in a manner discriminatory against black persons. This post-conviction relief was denied and we granted his petition for review which we consolidated with this appeal. In addition, appellant claims he was denied due process of law when the court refused to hold a hearing on this claim. In a similar argument appellant claims the death penalty has been visited upon poor persons and male persons in disproportionate numbers. We agree with the state's assertion that neither the federal constitution nor this

unanimous jury verdicts and, accordingly, the Sixth and Fourteenth Amendments. Given the fact that one justice of the Court believed that the death penalty should not be imposed, and did not sign the warrant of execution, a less than unanimous "jury" verdict has resulted.

This poses constitutional problems in several ways. In Proffitt v. Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), this Court indicated that the Constitution did not require jury sentencing in capital cases, and noted that sentencing by a judge should lead, if anything, "to greater consistency" in imposing the ultimate penalty.

In Johnson v. Louisiana, 406 U.S. 356, 364-365, 92 S. Ct. 1620, 32 L. Ed. 2d 152, 160-161 (1972), this Court held it proper under the Due Process and Equal Protection Clauses for a State to permit a criminal conviction with less-than unanimous juries. See also Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972). In so doing, however, the Johnson Court noted that Louisiana properly required unanimous verdict in capital cases, given the severity of the punishment at issue.

In the instant case, the consistency which must be the hallmark of constitutional imposition of the death penalty is absent from the Arizona Supreme Court's opinion, both in its review of the trial court's decision as well as its independent evaluation of the propriety of the sentence.

Petitioner submits that, under these circumstances, the Sixth Amendment and the Equal Protection Clause and Due Process Clauses of the Fourteenth Amendment are violated. Had Arizona required jury sentencing in capital cases, and had one of the jurors felt as did Justice Feldman in this matter,

then the constitutional provision barring less-than-unanimous jury verdicts in criminal cases would have prevented application of the death penalty in this case. However, given the fact that Arizona's death penalty scheme utilizes a trial judge with independent review by the state supreme court, the fact that one justice does not believe the death penalty should be imposed offers Petitioner no solace. This, Petitioner submits, constitutes a violation of both the Sixth Amendment right to trial by jury as well as the Fourteenth Amendment violation.

In Proffitt, it was in large part this Court's reliance upon the consistency of a sentencing judge which permitted non-jury sentencing in capital cases. This case presents what is an important example of a situation in which sentencing by a judge, in a state requiring unanimous jury verdicts, has the effect of depriving a defendant of those rights granted to similarily-situated individuals in jurisdictions where the jury recommends the sentence.

Finally, while this argument is based in part upon a state's constitutional provisions, this should not preclude review by this Court. Where mixed state and federal constitutional law questions exist, and where the issue which arises deals with a federal constitutional violation inherent in the state's application of its own constitution, Petitioner submits that proper grounds exist for review. See Michigan v. Long, ___ U.S. ___, 103 S. Ct. ___, 77 L. Ed. 2d 1201, 1212-1216 (1983).

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CONCLUSION

Petitioner requests that the petition for certiorari be granted.

RESPECTFULLY SUBMITTED this 19 day of September, 1983.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

BY: _____
LAWRENCE H. FLEISCHMAN
Attorney for Petitioner

APPENDIX A

State v. Richmond, ___ Ariz. ___, 666 P. 2d 57 (1983)

Cite as 668 P.2d 37 (Ariz. 1983)

victed of murder, to death, and defendant appealed. The Supreme Court, Holohan, C.J., held that: (1) information charging defendant with first-degree murder gave adequate notice of charges against him; (2) right to speedy trial did not apply to sentencing; (3) defendant was not prejudiced by six-year delay in sentencing; (4) defendant failed to show that sentencing judge entertained actual bias or prejudice against him; (5) evidence was sufficient to support finding that defendant intentionally killed victim; (6) trial court properly considered prior murder conviction to be aggravating circumstance; (7) evidence supported finding that murder was committed in especially heinous and depraved manner; (8) trial court properly considered evidence of defendant's good character as mitigating circumstance, but found it unpersuasive; (9) mitigation offered by defendant was not sufficiently substantial to outweigh aggravating circumstances warranting imposition of death penalty; (10) death penalty was not excessive or disproportionate to penalty imposed in similar cases; and (11) death penalty statute, on its face and in application, is constitutional.

Affirmed.

Cameron, J., specially concurred with opinion in which Gordon, V.C.J., concurred.

Feldman, J., dissented with opinion.

STATE of Arizona, Appellee,

v.

Willie Lee RICHMOND, Appellant.

No. 2914.

Supreme Court of Arizona,
En Banc.

May 12, 1983.

Rehearing Denied June 28, 1983.

After remand for resentencing, 114 Ariz. 184, 560 P.2d 41, the Superior Court, Pima County, Cause No. A-24252, Richard N. Royston, J., sentenced defendant, con-

1. Constitutional Law ⇐265

Due process requires that defendant be advised of specific charges against him; however, there is no requirement that defendant be advised in indictment or information of statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in event of conviction. U.S.C.A. Const.Amend. 14.

2. Indictment and Information ⇐71.4(5)

Information charging first-degree murder gave defendant adequate notice of charges against him, and thus satisfied Sixth Amendment right to know nature and cause of accusation. U.S.C.A. Const.

Amend. 6; A.R.S. §§ 13-451 to 13-453 (Repealed).

2. Criminal Law ⇐996(2)

Six-year delay in resentencing of defendant did not deprive defendant of constitutional right to speedy trial, in that right to speedy trial does not extend to sentencing. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1177

Defendant was not prejudiced by six-year delay in resentencing where such delay resulted in defendant having opportunity to present additional evidence as negation of sentence, and sentence he received at resentencing was no harsher than original sentence.

5. Constitutional Law ⇐70.1(10), 203, 270(1)
Criminal Law ⇐189

Resentencing of defendant was not violation of ex post facto prohibitions, double jeopardy prohibitions, nor of due process and separation of powers requirements. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Amends. 5, 14.

6. Jury ⇐24

Trial court's resentencing of defendant did not deny defendant his alleged constitutional right to have jury decide presence of aggravating or mitigating circumstances.

7. Constitutional Law ⇐270(1)

Once defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring defendant to establish mitigating circumstances, as facts which would tend to show mitigation are peculiarly within knowledge of defendant. U.S.C.A. Const.Amend. 14.

8. Judges ⇐47(2)

A litigant is entitled to impartial judge at any stage of proceedings; however, this does not include a judge totally ignorant of previous proceedings.

9. Constitutional Law ⇐270(1)
Criminal Law ⇐1165(1)

Where defendant who was resentenced presented no evidence that sentencing judge entertained actual bias or prejudice against him, defendant failed to show prejudice or deprivation of due process. U.S.C.A. Const.Amend. 14.

10. Criminal Law ⇐1134(8)

In each case where death penalty is imposed, Supreme Court will conduct independent review of record to assure just result.

11. Homicide ⇐230

In first-degree murder prosecution, evidence that defendant played integral parts in events which caused victim's death, willingly assisted in acts which were intended to cause victim's death, and that he drove vehicle that was used to kill victim was sufficient to support finding that defendant intended to take a life. A.R.S. §§ 13-451 to 13-453 (Repealed).

12. Homicide ⇐354

In sentencing defendant convicted of murder, trial court did not err in finding prior murder conviction to be aggravating circumstance, even though defendant was convicted of prior murder subsequent to conviction in instant case. A.R.S. § 13-703, subd. F, par. 1.

13. Criminal Law ⇐1208(5)

For purposes of applying statute making commission of offense in especially heinous, cruel or depraved manner an aggravating circumstance, in first-degree murder prosecution, "cruelty" involves victim's pain or suffering before death. A.R.S. § 13-703, subd. F, par. 6; §§ 13-451 to 13-453 (Repealed).

See publication Words and Phrases for other judicial constructions and definitions.

14. Homicide ⇐354

In first-degree murder prosecution, there was no evidence to indicate that victim suffered more pain than that of initial blow which rendered him unconscious, and thus, offense was not committed in cruel manner, for purposes of statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13-703, subd. F, par. 6; §§ 13-451 to 13-453 (Repealed).

15. Homicide ⇐354

As used in statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner, "heinous" and "depraved" involve mental state and attitude of offender as reflected in his words and actions; factors to be considered include infliction of gratuitous violence on victim, and needless mutilation of victim. A.R.S. § 13-703, subd. F, par. 6.

See publication Words and Phrases for other judicial constructions and definitions.

16. Homicide ⇐354

Where murder victim was run over twice and his skull crushed, such was ghastly mutilation of victim sufficient to support finding that offense was committed in especially heinous and depraved manner, for purposes of statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13-703, subd. F, par. 6; §§ 13-451 to 13-453 (Repealed).

17. Criminal Law ⇐1208(6)

Presence of any one of elements of cruelty, heinousness, or depravity is sufficient to constitute aggravating circumstance under statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13-703, subd. F, par. 6.

18. Homicide ⇐354

In resentencing defendant, convicted of first-degree murder, trial court did not err in failing to find his improved conduct and character to be mitigating circumstance; though it would have been arbitrary decision had court refused to consider the evidence, it was sufficient that court did consider the evidence but found it unpersuasive. A.R.S. §§ 13-451 to 13-453 (Repealed).

19. Criminal Law ⇐1134(8)

In death penalty cases, Supreme Court will conduct independent examination of record to determine for itself the presence or absence of aggravating and mitigating circumstances and weight to give to each, and will independently determine propriety of the sentence. A.R.S. § 13-703.

20. Homicide ⇐354

In resentencing defendant, convicted of first-degree murder, trial court correctly found aggravating circumstances that defendant had been convicted of offense, murder, for which life imprisonment or death was imposable, that defendant had been convicted of felony involving use or threat of violence, and that offense was committed in especially heinous manner. A.R.S. § 13-703, subd. F, para. 1, 2, 6.

21. Homicide ⇐354

Evidence supported trial court's finding that character of defendant, convicted of first-degree murder, had not changed between time of conviction and resentencing, and thus, such was not mitigating factor sufficient to outweigh aggravating circumstances warranting death sentence. A.R.S. §§ 13-451 to 13-453 (Repealed).

22. Homicide ⇐354

In first-degree murder prosecution, imposition of death penalty was not disproportionate to penalty imposed in similar cases, in which defendants robbed and murdered their victims. A.R.S. §§ 13-451 to 13-453 (Repealed).

23. Criminal Law ⇐1213
Homicide ⇐351

Death penalty statute, on its face and in application, does not allow for arbitrary and capricious determinations, and is thus not violative of Eighth Amendment. A.R.S. § 13-703; U.S.C.A. Const.Amend. 8.

24. Criminal Law ⇐1208(1)

Neither Federal Constitution nor Arizona Supreme Court require that imposition of death penalty precisely reflect composition of general population.

25. Criminal Law ⇐1208(6)

Before one is subject to death penalty, state must charge him and prove him guilty beyond reasonable doubt, and must prove aggravating circumstances beyond reasonable doubt.

26. Criminal Law ⇐1134(8), 1208(6)

When death penalty is imposed, trial court may find mitigating factors substantial enough to call for leniency, and Supreme Court will then conduct independent review of all matters of aggravation and mitigation to determine if death sentence was properly imposed, and will conduct proportionality review in every case to assure penalty is not excessive nor disproportionate to sentences imposed in similar cases; such safeguards are blind to color, wealth or sex of defendant.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, and Jack Roberts, Asst. Atty. Gen., Phoenix, for appellee.

Richard S. Oseran, Former Pima County Public Defender, Frederic J. Dardis, Pima County Public Defender by Allen G. Minker, Tucson, for appellant.

HOLOHAN, Chief Justice.

Appellant, Willie Lee Richmond, was found guilty of first degree murder on February 5, 1974, and was sentenced to death. This court affirmed the conviction and the sentence in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). However, we later vacated the death sentence pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), and remanded for resentencing.

After a sentencing hearing, appellant again was sentenced to death, from which sentence he now appeals. Additionally, appellant asks that we review the denial of his petition for post-conviction relief. We have jurisdiction pursuant to A.R.S. § 13-4031 and Rule 32.9, Arizona Rules of Criminal Procedure, 17 A.R.S.

The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

NOTICE

[1, 2] Appellant claims a violation of his sixth amendment right to know the nature and cause of the accusation against him because the information did not put him on notice that he could receive the death penalty, nor did it state what aggravating factors would be presented. Appellant did not raise this issue at the time he appealed his conviction, but, as we are required, pursuant to A.R.S. § 13-4035, to search the record for fundamental error, we will address this issue. Appellant was charged with first degree murder in violation of A.R.S. § 13-451, § 13-452 and § 13-453.[1] At that time § 13-453 provided that "a person

1. These are section numbers under the old criminal code, they have since been renumbered or repealed.

guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life." In *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982), we addressed the issue raised by appellant, and we held that an indictment charging first degree murder was sufficient on its face to inform the defendant of the crimes charged and the sentences which could be imposed. Due process requires that a defendant be advised of the specific charges against him. The information in this case gave appellant adequate notice of the charges. There is no requirement that a defendant be advised in the indictment or information of the statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in the event of a conviction.

SPEEDY TRIAL

[3] Appellant was first sentenced to death in February of 1974. He was resentenced to death in 1980. Now appellant claims he was denied his right to a fair and speedy sentencing, and that he was prejudiced by the six-year gap which deprived him of the ability to effectively present his case for mitigation. We addressed this issue in *State v. Blazak*, *supra*, where we stated, "[n]either this court nor the United States Supreme Court has found that the right to a speedy trial extends to sentencing." 131 Ariz. at 600, 643 P.2d at 696, citing *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475 (1980).

[4] The delay resulted in the appellant having an opportunity to present additional evidence as mitigation. Additionally appellant has failed to show how he was prejudiced. He was afforded the opportunity to present his original mitigating evidence as well as any additional mitigating factors which may have been omitted in the first sentencing hearing or which have arisen since that hearing. The sentence he received at his resentencing was no harsher than the original sentence. We are unable to find any prejudice resulting from the delay.

RESENTENCING UNDER WATSON

[5] On numerous occasions this court has heard and rejected arguments that resentencing under *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979) is unconstitutional. Appellant asserts several grounds for this argument claiming the resentencing is: (1) a violation of ex post facto prohibitions; (2) a violation of double jeopardy prohibitions; and (3) a violation of the due process and separation of powers requirements because it is a judicially created penalty. We have addressed these issues many times before with resolutions adverse to appellant. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982); *State v. Jordan*, 126 Ariz. 253, 614 P.2d 825, cert. denied, 449 U.S. 988, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). These arguments have also been considered and rejected by the Ninth Circuit Court of Appeals in *Knapp v. Cardwell*, 667 F.2d 1253, cert. denied, —— U.S. ——, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

SENTENCING CHALLENGES

[6, 7] The sentencing procedure is contested by appellant on three other grounds. First, that he was denied his alleged constitutional right to have a jury decide the presence of aggravating or mitigating circumstances. We have previously rejected this argument. *State v. Gretzler*, *supra*; *State v. Blazak*, *supra*; *State v. Watson*, *supra*. Second, appellant contends it is unconstitutional to place the burden of proof of mitigating circumstances on the defendant. Once the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances. As we stated in *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980), "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant."

Third, appellant claims he was denied his right to be sentenced by an impartial trier of fact. This contention is based on evi-

dence which was introduced at the original sentencing. At the first sentencing hearing, defense counsel presented psychiatric testimony which classified appellant as a sociopath or psychopath. This condition was described as one who never learns from experience, has poor impulse control, has a lack of moral insight and shows very little guilt. The psychiatrists characterized appellant as callous, grossly selfish, irresponsible and impulsive. This testimony was introduced as mitigation.

Under the Arizona death penalty statute in effect at the time, the judge could consider *only* four enumerated factors as mitigation. One of the statutory mitigating circumstances was that "the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."[1] The psychiatric testimony was intended to show the existence of this particular mitigating factor. The judge did not find this factor to exist.

Five years later, when this court ordered a resentencing, the case was returned to the original trial judge. Appellant's request for a change of judge was denied by the presiding judge.[2] At the time of the resentencing, the Arizona death penalty statute, A.R.S. § 13-703, required that the judge who heard the case also conduct the sentencing. *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980). The statute has recently been amended to allow a judge other than the trial judge to conduct the sentencing hearing if the trial judge has died, resigned, or become incapacitated or disqualified.

[8, 9] A litigant is entitled to an impartial judge at any stage of the proceedings. *See, State v. Barnes*, 118 Ariz. 200, 575 P.2d 830 (App.1978). However this does not include a judge totally ignorant of the previous proceedings. Any judge who might have conducted the resentencing in this case would have before him the record of the trial and the original sentencing hearing. Appellant presents no evidence that the sentencing judge entertained actual bias or prejudice against him. We stated in *State v. Greenawalt*, 128 Ariz. 150, 168, 624 P.2d 828, 846 *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981), "evidence is not inadmissible simply because it paints a black picture of the defendant's character or his bent for evil." Without some specific showing of bias on the part of the sentencing judge, we cannot say appellant was prejudiced or deprived of due process. From time to time appellate courts send cases back to a trial court for resentencing. The fact of resentencing is not sufficient, standing alone, to infer bias or prejudice.

The psychiatric evidence of the first mitigation hearing was not used in the second hearing, and there was no reference to that evidence in the second hearing.

[10] Additionally, in each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case, and find no evidence of prejudice exhibited by the sentencing judge.

FELONY MURDER AND THE DEATH PENALTY

The jury which convicted appellant was instructed on both theories of first degree murder—premeditation and felony murder. The jury returned a verdict of first degree murder. There is no indication in the record whether the jury's verdict was based on premeditation or felony murder.

The appellant contends that under the state of the record in this case the penalty of death cannot be imposed. The United States Supreme Court recently discussed the issue of felony murder in *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The Court observed:

2. Former A.R.S. § 13-454(F)(1), renumbered as A.R.S. § 13-703(G)(1).

3. The motion was denied because it was not timely made. We will, however, examine this contention for fundamental error.

Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which a murder was committed.

Id. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. The Court concluded that death was not a valid penalty for one who neither took life, attempted to take life, nor intended to take life.

[11] By comparison, in the instant case appellant was an active participant. Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull—one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.

Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corrella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

PRIOR CONVICTION

Appellant was convicted in the instant case on February 5, 1974. He was convicted of another murder on August 9, 1974, even though that murder had occurred before the murder in the instant case. At the resentencing in 1980 the State sought to use this later conviction as an aggravating factor. Appellant argues this was improper.

A.R.S. § 13-703(F) enumerates aggravating circumstances which should be considered in determining the imposition of the death penalty. A.R.S. § 13-703(F)(1) states that "the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." Citing *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), appellant contends the trial court erred in finding this aggravating circumstance.

In *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), this court stated:

Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan*, [*supra*,] or the order in which the convictions were entered. [*State v. Valencia*, 124 Ariz. at 139, 602 P.2d at 807, 809 (1979).]

Any language suggesting the contrary in *State v. Ortiz*, *supra*, [131 Ariz. at 270–11, 639 P.2d at 1035–36] is hereby disapproved. In *Ortiz*, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.

135 Ariz. at 57, n. 2, 659 P.2d at 16, n. 2.

[12] In light of the language in *Gretzler*, the trial court did not err in finding the prior murder conviction to be an aggravating circumstance.

CRUEL AND HEINOUS

[13, 14] The trial court found as another aggravating factor that the offense had been committed in an especially cruel and heinous manner pursuant to A.R.S. § 13-703(F)(6) which provides: "The defendant committed the offense in an especially heinous, cruel or depraved manner." Appellant contends this was error.

"Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, *supra*; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an especially cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

[15–17] "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

The presence of any one of the three elements—cruel, heinous, or depraved—is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 88, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

Appellant argues in the alternative that the "cruel, heinous and depraved" language of Arizona's death penalty statute is unconstitutionally vague and broad. We have addressed this contention in *State v. Grets-*

ler, supra, and found no constitutional infirmity in the statute.

The trial court judge did not find that "the defendant committed the offense as a consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). The trial court judge was under the mistaken belief that this subsection only applied to the "contract" type murder. Appellant was sentenced on March 13, 1980. This was prior to our decision in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1087, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), where we specifically held that this aggravating circumstance is not limited to the "hired gun" or "contract" type killing. In *Clark* we stated that this subsection applies to any murder committed for financial gain.

The state addressed this issue in its answering brief, but did not raise the issue through a cross-appeal. Thus, we need not reach the issue of the propriety of this court finding an additional aggravating circumstance which was not found by the trial court.

MITIGATING CIRCUMSTANCES

[18] At the 1980 sentencing hearing appellant presented evidence of his conduct in prison since 1974 when he first went to death row. Testimony was received from members of appellant's family, his friends, and from prison counselors which related appellant's good character, the change in attitude he has undergone and his attempts to better himself. Appellant contends the trial court erred in failing to find his improved conduct and character to be a mitigating circumstance. Appellant cites *State v. Watson (II)*, 129 Ariz. 60, 628 P.2d 943 (1981), where very similar evidence was presented as mitigation. There we held that the evidence could and should be considered a mitigating circumstance. While it would have been an arbitrary decision had the court refused to consider the evidence, it is clear from the record the court *did* consider the evidence but found it unpersuasive.

INDEPENDENT REVIEW

[19, 20] The sentencing statute, A.R.S. § 13-703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence. *State v. Gretzler*, *supra*, *State v. Blazak*, *supra*. The trial court correctly found three aggravating circumstances: first, that the defendant has been convicted of an offense (murder) for which life imprisonment or death was imposable, A.R.S. § 13-703(F)(1); second, that the defendant has been convicted of a felony (murder and kidnapping) involving the use or threat of violence, A.R.S. § 13-703(F)(2); third, that the offense was committed in an especially heinous manner, A.R.S. § 13-703(F)(6).

As mitigating factors the court found that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged, that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense and had solicited an act of prostitution with Faith Erwin, a minor, near the time of the offense. The court also found that the jury was instructed on the felony murder rule as well as on matters related to premeditated murder. Additionally, the court found appellant's family was supportive of him and would suffer considerable grief as a result of the imposition of the death penalty.

[21] The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson (II)*, *supra*, we held that evidence revealing a substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's charac-

court has ever required that the imposition of the death penalty precisely reflect the composition of the general population. What the United States Supreme Court has required is guidelines to bridle the discretion of the sentencing authority, thus minimizing the risk of arbitrary imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[25, 26] Before one is subject to the death penalty in Arizona, the state must charge him and prove him guilty beyond a reasonable doubt. Then the state must prove aggravating circumstance(s) beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 293, 614 P.2d 825 (1980). The trial court may then find mitigating factors substantial enough to call for leniency. This court will then conduct an independent review of all matters of aggravation and mitigation to determine if the death sentence was properly imposed. *State v. Gretzler, supra; State v. Richmond, supra.* In addition, we conduct a proportionality review in every case to assure the penalty is not excessive nor disproportionate to the sentences imposed in similar cases. *State v. Gretzler, supra; State v. Richmond, supra.* These safeguards are blind to the color, wealth or sex of the defendant. We find no merit in appellant's argument.

We do not find it necessary to address appellant's last contention that the death penalty is a violation of international law.

We have examined the entire record for fundamental error, as required by A.R.S. § 13–4035, and find none.

The sentence of death is affirmed.

HAYS, J., concurs.

CAMERON, Justice, specially concurring.

I agree that the death penalty is properly imposed in this case. However, because I disagree with the majority in its holding that the crime was especially heinous and depraved, I feel that I must specially concur.

I do so not because I am insensitive to the tragic consequences of defendant's criminal conduct, but because I believe that if the death penalty statute in Arizona is to pass constitutional muster, it must be interpreted in such a way that only those who clearly come within the mandate of our legislature and the United States Supreme Court are given this punishment. The death penalty is reserved only for those crimes which are above the norm of first degree murders, or for defendants who are above the norm of first degree murderers. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27–28 (1983); *State v. Watson*, 129 Ariz. 60, 68, 628 P.2d 943, [illegible] (1981).

The majority finds this crime to be especially heinous and depraved under A.R.S. § 13–703(F)(6), based on two of the criteria set out in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), the infliction of gratuitous violence on the victim, and the needless mutilation of the victim. I do not believe the facts of this case fit within the proper boundaries of these criteria.

The infliction of gratuitous violence was found and the death penalty imposed in *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), in which the defendant continued to shoot his victims after it was apparent they had been fatally wounded, and then began kicking one of the victims in the face repeatedly while the victim was already unconscious or dead. We said,

> We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a " " " depraved nature so as to set it apart from the 'usual or the norm.' 126 Ariz. at 40, 612 P.2d at 496, quoting *State v. Ceja*, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977). *See also State v. Gretzler*, supra, 135 Ariz. at 52, 659 P.2d at 11.

We similarly held that gratuitous violence was inflicted in *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983), where after the killing the defendant climbed on top of the

corpse and beat its face repeatedly with his fists, resulting in facial wounds and bleeding. In *State v. Woratzeck*, 134 Ariz. 452, 657 P.2d 865 (1982), we also held that gratuitous violence was employed where the defendant strangled, stabbed and bludgeoned the victim to death, and the force used by each of these three methods was sufficient to kill. The death penalty was properly imposed in both *Jeffers* and *Woratzeck*.

In the instant case the victim was killed by being run over by an automobile. The evidence adduced at trial indicates the automobile was likely backed over the victim, and then driven forward over the victim. There is no evidence to suggest that the defendant knew or should have known that the victim was dead after the first pass of the car. *Cf. State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982) (victim still alive after defendant ran over him with his automobile several times). Therefore, unlike the defendants in *Ceja*, *Jeffers*, and *Woratzeck*, supra, there has been no showing that this defendant inflicted any violence on the victim which he must have known was "beyond the point necessary to kill."

The criterion of mutilation of the victim was demonstrated by *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981), where the defendant strangled to death his prison cellmate and then carved the word "Bonza" into the victim's back. Similarly in *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981), after suffocating the female victims the defendant proceeded to mutilate their sex organs and breasts with sharp objects. The death penalty was imposed in these two cases based in part on the finding that the crime was committed in a heinous and depraved manner. The facts of these cases are in marked contrast to the present case. Here there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to mutilate the corpse.

It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),

> [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. Id. at 433, n. 16, 100 S.Ct. at 1767, n. 16, 64 L.Ed.2d at 409, n. 16 (plurality opinion). *See also* id. at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410–11 (Marshall, Brennan, JJ., concurring) ("[We] also agree that * * * the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant.")

Our statutory aggravating circumstance of a heinous or depraved killing focuses on the state of mind of the killer, *see State v. Graham*, 135 Ariz. 209, at 212, 660 P.2d 460 at 463; *State v. Jeffers*, supra, 135 Ariz. at ——— - ———, 661 P.2d at 1130–31; *State v. Zaragoza*, supra, 135 Ariz. at ——, 659 P.2d at 28–29; *State v. Gretzler*, supra, 135 Ariz. at ——, 659 P.2d at 10; *State v. Wortzeck*, supra, 134 Ariz. at 457, 657 P.2d at 870, not on the appearance of the corpse. Although the resulting scene was gruesome, I believe the proper application of the criteria discussed above fails to support a finding that the killer acted in a state of mind which was especially heinous or depraved. This crime is therefore not above the norm of first degree murders.

The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent

crime justifies the imposition of the death penalty.

I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result.

GORDON, Vice Chief Justice, concurring.

I concur in Justice Cameron's special concurrence.

FELDMAN, Justice, dissenting.

I cannot agree with that portion of the majority decision which holds that the death penalty may now be properly imposed upon the defendant.

I agree with Justice Cameron that the murder was not heinous and depraved. The remaining aggravating circumstances in this case were that defendant had been convicted of an offense for which life imprisonment or death was imposable, A.R.S. § 13-703(F)(1), and that defendant had been convicted of a felony involving the use or threat of violence, id. (F)(2). Both of these circumstances pertain to the character of the defendant, defining the type of murderer and serving to set the defendant apart and above the "norm" of killers. As we stated in *State v. Watson* (*Watson II*), 129 Ariz. 60, 68, 628 P.2d 943, 946 (1981):

> [T]he death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, *or the background of the defendant sets him apart from the usual murderer.*

(Emphasis supplied.) As Justice Cameron correctly states, the crime here does not stand out "above the norm of first degree murders"; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant.

In *Watson II*, supra, we held that rehabilitation evidence could and should be considered a mitigating circumstance. *Id.* at 63–64, 628 P.2d at 946–47. Thus, *Watson II* stands for the proposition that the relevant question in such cases is not limited to defendant's character at the time of the offense, but also includes his character at the time the death penalty is to be carried out.

The majority opinion indicates that the evidence of defendant's improved conduct and character was "very similar" to that presented in *Watson II*, yet concludes that the mitigation evidence offered by defendant was not sufficiently substantial to call for leniency. While defendant's prior murder conviction weighs heavily against him, in my view the rehabilitation evidence "very similar" to that presented in *Watson II* tips the balance strongly in favor of reducing defendant's sentence to life imprisonment.

At the final sentence hearing, twelve individuals offered evidence of defendant's changed character and efforts to rehabilitate himself since his imprisonment in 1974. These witnesses included several members of his family, employees of the Arizona State Prison at Florence, a fellow prisoner on death row, and a local missionary who regularly visited and corresponded with the defendant. The theme which ran through all of the testimony at the sentence hearing was that defendant had changed remarkably since he had arrived at prison six years previously. The witnesses believed that defendant's attitude had improved materially, that he had found a purpose in life and now had a genuine desire to better himself and, more important, to help others. There seemed to be no question but that this desire to help others was more than subjective; it was actually carried into effect.

There were objective facts to support these opinions. Among the objective factors which manifested the change in defendant were the following: Defendant had transformed himself into a literate person, learning to read and write. He had learned to type. Witnesses testified that defendant often read three books a week and exchanged reading materials with other prisoners. Defendant had employed his newfound ability to read, write and type by using his time in prison in a constructive manner, typing numerous letters to family and friends, and studying the Bible. The

counselors employed at the prison testified that defendant provided encouragement, advice and spiritual assistance both to his family and to other prisoners.

Defendant's family noted the difference in his attitude. Defendant had become settled and matured. He was honestly trying to give some meaning to his life. From prison, both in the form of letters and visits from his family, defendant assisted them with their problems, gave them advice and encouraged them. He was truly concerned for his family's welfare. The same was true for his relationship with other prisoners.

The counselors employed by the prison also testified that defendant's attempts to better and rehabilitate himself were genuine. Of course, this is a matter of opinion, but it was uncontradicted and, in light of the experience of the prison counselors, I would place great weight on their assessment.

Finally, the defendant himself testified that if given life imprisonment he understood that he would never live outside prison, because the life sentence would and should be imposed consecutively to the other sentences which he was already serving. Nevertheless, he felt that he had changed and had something worthwhile to offer others in prison society and his family if he were allowed to live. Given the current problems of our prison system, it is certainly necessary that we provide inmates with role models and assistance for rehabilitation, especially when such models are based upon changes in attitude and religious commitment.[1] The record available to us thus leads to an overwhelming conclusion that defendant has made a sincere, successful and continued effort to change his character, rehabilitate himself and contribute in his own way to society. As the majority indicates, the trial court could not make a "definitive finding" on the question of rehabilitation. While the majority speculates that the trial court was "not convinced" that defendant's character had changed, the fact is that the trial court made no such finding. The majority states that the facts "cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor." Again, the trial court made no such statement. In any event, the rehabilitation issue does not turn primarily upon defendant's testimony at all. There were twelve other witnesses, unimpeached and unrebutted on the issue, and the proof of change, rehabilitation and contribution to society stands uncontested in this case. Nor is this change some desperate, last-minute attempt by defendant to avoid the death penalty. The testimony indicated that the change in defendant's attitude and character manifested itself long before 1981 when *Watson II* first established that such a change was relevant in deciding whether to impose death.

Thus, the majority's conclusion on independent review that the trial court could have found defendant's changed character was not genuine, and therefore "could reasonably decline to find the proffered evidence to be a mitigating factor" is incorrect for two reasons. First, the trial court made no such finding. Second, there are no facts to support such a finding, even if it had been made. The State advances no such facts in this court, though it does not admit the change in character is genuine. Of

1. The conclusion that because of his change in character the defendant would serve as a useful role model for other prisoners is more than mere speculation. The May, 1983 issue of *La Roca*, a magazine published by and for prisoners at the Arizona State Prison, contains an article on defendant written by Charles Doss, a prisoner who serves as editor of the magazine. In an article commencing at page 19, entitled "Death Row Revisited," Mr. Doss writes of defendant's attitude and actions when he first came to death row ten years earlier and the remarkable change which has taken place with the passage of years. The article illustrates that both inside and outside the walls of the state prison a man's life and behavior may set an example which serves as a standard for others. The article is not part of the record, but the statute provides that mitigating evidence may be considered regardless of admissibility under the rules of evidence and may consist of "any factors" relevant to defendant's character. A.R.S. § 13-703(C) and (G).

course, it is the State's obligation to examine any purported change in character with a deservedly cynical eye. I, too, agree that it would be better if felons found God before committing their crimes rather than before being punished. It is the court's obligation, however, to recognize the possibility and principle of redemption and rehabilitation.

Further, independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. *Watson II*, 129 Ariz. at 63, 628 P.2d at 946. While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional, *State v. Watson* (*Watson I*), 120 Ariz. 441, 586 P.2d 1253 (1978), and, as a result, defendant has been given time which he has put to good use. While quick punishment may deter, punishment of this defendant at this time serves only to illustrate that redemption and rehabilitation have no practical purpose.

Speedy imposition of the ultimate penalty might also have served the societal interest in retribution. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929–30, 49 L.Ed.2d 859 (1976). But, again, the imposition of death upon a defendant who has changed so remarkably serves no valid purpose as far as retribution is concerned, because we now visit society's retribution upon a different person. Nor is society protected by imposition of the death penalty since reduction to life imprisonment would ensure that this defendant would not become eligible for parole during his lifetime. By putting this defendant to death in the face of his efforts to change and the reasonable prospect that if allowed to live he will be of value to society, we accomplish nothing but revenge. To some, especially those in the heat of anger, this may seem a sufficient reason to kill. The law should not be swayed by such emotions; it does not and cannot kill in anger; it rejects the concept of an eye for an eye and a tooth for a tooth.

The totality of the evidence offered in mitigation establishes sufficient grounds for this court to reduce defendant's sentence to life imprisonment without possibility of parole for 25 years, to be served consecutively to all other sentences. Accordingly, I dissent from the portion of the opinion which, on independent review, affirms the imposition of the death sentence.

APPENDIX B

Copy of Warrant of Execution, State v. Richmond

CH7

JUL - 7 1983

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
801-WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

July 5, 1983

James G. Ricketts, Director
Department of Corrections
321 West Indian School Road, Suite 1
Phoenix, Arizona 85013

Re: STATE vs. WILLIE LEE RICHMOND
Supreme Court No. 2914
Pima County No. A-24252

Dear Mr. Ricketts:

Enclosed is a certified copy of the Warrant of Execution in the above-entitled matter. The execution is set for the 7th day of September, 1983.

Please sign the enclosed copy of this letter and return the same to this office as our receipt.

Very truly yours,

S. ALAN COOK, Clerk

By Kathleen E. Kemplay
Deputy Clerk

Enclosure
cc:
Institutional Administrator, Arizona State Prison, P.O. Box 629, Florence, Arizona 85232
Board of Pardons and Paroles, 321 West Indian School Road, Suite 1, Phoenix, Arizona 85013
Hon. Robert K. Corbin, Attorney General, 1275 West Washington, Phoenix, Arizona 85007 Attn: William J. Schafer III and Jack Roberts
Frederic J. Dardis, Pima County Public Defender, 45 West Pennington, Third Floor, Tucson, Arizona 85701 Attn: Allen G. Minker
Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701
Willie Lee Richmond, Box B 33415, Arizona State Prison, Florence, Arizona 85232

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

vs.

WILLIE LEE RICHMOND,

Appellant.

Supreme Court
No. 2914

Pima County
No. A-24252

WARRANT OF EXECUTION

The above-entitled cause was heard and fully considered by this Court on the 10th day of June, 1982, and having finally decided the cause, this Court did affirm the judgment of the Superior Court of Pima County, State of Arizona, appealed from in this cause, and did hand down its decision, which decision is now of record in this Court.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that Wednesday, the 7th day of September, 1983, be and the same is hereby fixed as the time when the judgment and sentence of death pronounced upon the appellant, WILLIE LEE RICHMOND, by the Superior Court of Pima County, State of Arizona, shall be executed by administering to WILLIE LEE RICHMOND lethal gas.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith prepare and certify under his hand and the seal of this Court a full, true and correct copy of this Warrant, and cause the same to be delivered to the Director of the Department of Corrections and the Superintendent of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of the appellant, WILLIE LEE RICHMOND, as commanded by the judgment and

sentence of death pronounced against WILLIE LEE RICHMOND, by the Superior Court of Pima County, State of Arizona, on the 13th day of March, 1980.

Upon the execution of WILLIE LEE RICHMOND, the Superintendent shall, pursuant to A.R.S. Section 13-706, forthwith make a return upon this Warrant to the Superior Court of Pima County, State of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the State Capitol, this 5th day of July, 1983.

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

APPENDIX C

A.R.S. § 13-703 (Arizona's Death Penalty Statute)

Ariz. Rev. Stat. § 13-703.

Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissiblity under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence

at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F of this section and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant

knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Amended by Laws 1979, Ch. 144, § 1, eff. May 1, 1979.

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
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LAWRENCE H. FLEISCHMAN
ATTORNEY FOR DEFENDANT
LHF:pfa 9/20/83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5449

WILLIE LEE RICHMOND,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, WILLIE LEE RICHMOND, asks leave to file the accompanying Petition for Writ of Certiorari without prepayments of costs and to proceed in forma pauperis.

The Petitioner's Affidavit in Support of this motion is

attached hereto. Petitioner proceeded as an indigent represented by the Pima County Public Defender throughout all state and federal habeas corpus proceedings.

DATED this 20 day of September, 1983.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

BY: _____
LAWRENCE H. FLEISCHMAN
Attorney for Petitioner

83-5449

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

STATE OF ARIZONA)
) ss:
COUNTY OF PIMA)

I, WILLIE LEE RICHMOND, being first duly sworn, deposes and says that I am the Petitioner in the instant Petition for Certiorari, that I am the Appellant in No. 2914, in the Arizona Supreme Court, that said Court has affirmed my judgment and conviction; that in support of my Motion to Proceed on the Petition for Certiorari without being required to repay fees, costs or give security therefor, I state that because of my proverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the Petition for Certiorari are true.

1. Are you presently employed? no

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payment, interest, dividends, or other source? no

3. Do you own cash or checking or savings accounts? List amount, number and location of checking/savings account. no

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (including ordinary household furnishings and clothing)? no

5. List the persons who are dependent upon you for support and state your relationship to those persons: none

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Willie Lee Richmond
WILLIE LEE RICHMOND

SUBSCRIBED AND SWORN to before me this 12th day of September, 1933, by WILLIE LEE RICHMOND.

Miriam A Stamps
NOTARY PUBLIC

MY COMMISSION EXPIRES:
My Commission Expires April 28, 1987

NO. 83-5449

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIE LEE RICHMOND,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
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the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

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Attorneys for RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. When the death penalty may be upheld upon the basis of two other aggravating circumstances, does petitioner raise a federal question by showing dissent among the Arizona Supreme Court about a third one?

2. Does any decision of this Court require that a state supreme court, or a sentencing judge, believe a defendant's proffered mitigation and give it sufficient weight to reduce the penalty to life?

3. Does the Constitution require unanimous appellate affirmance of the death penalty?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

AUTHORITIES

STATEMENT OF THE CASE

Petitioner's statement of the case is basically correct. The two aggravating circumstances upon which the Arizona Supreme Court unanimously agreed were Ariz.Rev.Stat.Ann. § 13-703(F)(1) and (2). The facts sustaining those circumstances -- which petitioner never challenges and chooses to ignore -- are the first-degree murder of Mary Dawson in July 1973, prior to the murder for which petitioner received the death penalty, and the armed kidnapping of Raul Granados in 1969. State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975). Petitioner also fails to point out that the record in the instant case establishes that he, then 25, was living with Faith Erwin, 15, regularly "fixing" with her, and, at least part of the time, receiving the earnings of her prostitution. Indeed, the murder of Bernard Crummett, the case before this Court, arose out of a scheme concocted by Richmond and Becky Corrella whereby, at Richmond's direction, she agreed to prostitute herself to Crummett.

Petitioner previously sought certiorari in this case, and this Court denied it. 433 U.S. 915 (1977).

In his attempt to have this Court grant certiorari, Richmond constantly and conveniently ignores a very salient fact: all five justices of the Arizona Supreme Court agreed that the state had proven two aggravating factors, the former murder of Mary Dawson and the armed kidnapping of Raul Granados. To support his arguments, he must of necessity focus upon the one circumstance about which, for factual reasons, the Arizona Supreme Court disagreed, glossing over the fact that two of the three justices who disagreed about the existence of the especially heinous factor did concur that his prior record set him above the norm of murderers and warranted death. State v. Richmond, ___ Ariz. ___, 666 P.2d at 67-69. (Concurrence of

Justice Cameron and Vice Chief Justice Gordon.) That left in dissent only Justice Feldman, who also agreed that the state had proven two aggravating factors.

REASONS FOR DENYING THE WRIT

A. Uniqueness of Petitioner's Case.

Petitioner's emphasis upon the uniqueness of his case, with respect to the applicability of one aggravating circumstance out of three, is one of the strongest arguments for denying the writ. If he could show that the Arizona Supreme Court is constantly divided about the definition (and he never challenges the definition of that particular circumstance) or the application of the definition to the facts, he would have a more persuasive case because that might indicate vacillation and uneven application of Ariz.Rev.Stat.Ann. § 13-703(F)(6). But he concedes the uniformity of definition, and, except for his case, the uniformity of application to the facts of all cases preceding and following his. Thus, his argument is that this Court should grant certiorari because, for the first time, the Arizona Supreme Court has split upon the resolution of whether the facts (and inferences therefrom) sustain the conclusion that he committed the murder in an especially heinous manner. That is an extremely weak basis for invoking alleged infringement of federally protected rights. Respondent will demonstrate, infra, that recent decisions of this Court clearly indicate this Court does not intend to involve itself in this kind of state evidentiary question in the absence of extraordinary circumstances, which are not present in this case.

Respondent must express a caveat to the Court as it reads pages 5-14 of the petition. The caveat is necessary because counsel for petitioner distorts the statutory and case law of Arizona to induce this Court to believe that Arizona courts pay little attention to any aggravating circumstance except

that one concerned with whether the crime was especially cruel, heinous, or depraved. Counsel apparently felt compelled to take this approach in order to divert attention from the two aggravating circumstances upon which the Arizona Supreme Court unanimously agreed.

Respondent will trace the development of this semantic strategy. At page 5 of the petition, petitioner fleetingly acknowledges that the Arizona statute accords no priority to the seven aggravating factors that make one eligible for the death penalty. Ariz.Rev.Stat.Ann. § 13-703(F)(1)-(7). Any one of those factors requires imposition of death unless the defendant can produce mitigation substantial enough to merit leniency. Ariz.Rev.Stat.Ann. § 13-703(E). The trial court has no authority to accord any particular aggravating circumstance more or less weight than another because any of the seven mandates death in the absence of substantial mitigation. Having accurately stated that the statute itself permits no priority among aggravating factors, counsel then begins to weave a subtle thread upon the loom of distortion. That thread conveys both implicitly and explicitly the following message: the one decisive factor that separates death penalty cases from "normal" first-degree murder is the circumstance of especially cruel, heinous, or depraved. That is to say, by inference, that Arizona courts almost never impose death unless that one circumstance is established. That is false both legally and factually. Clear evidence of this misleading syllogism is at pages 5, 7, 13-14 of the petition. When petitioner says the Arizona Supreme Court has often indicated that 13-703(F)(6) is "the one which separates a death penalty case from a 'normal' first-degree murder," he distorts by omission. Petition at 5. The Arizona Supreme Court has said that circumstances that separate a particular murder from other murders may be proved

by establishing the existence of Ariz.Rev.Stat.Ann. § 13-703(F)(6). Petitioner skillfully converts this into what separates a death penalty case from other murders, i.e., if the evidence satisfies that one circumstance, the defendant will receive death regardless of any other aggravation or mitigation. Petitioner continues this theme at page 7 by saying that his case presents a "critical disagreement . . . about the existence of the one aggravating factor which the Court has said separates 'normal' first-degree murder cases from death penalty cases." (Emphasis supplied.) Petitioner cites no case because there is no case that holds that one factor is the sole factor that determines that a defendant will receive the death penalty despite other aggravation or mitigation. At page 13 petitioner reiterates this same reasoning by saying "this particular circumstance carries special weight in Arizona's death penalty sentencing scheme, since it is the factor which separates death penalty cases from that of a 'normal' first-degree murder." (Emphasis supplied.) Again, petitioner employs the definite article, semantically undergirding the false syllogism he wishes this Court to accept uncritically. What Arizona case says that Ariz.Rev.Stat.Ann. § 13-703(F)(6) carries special weight? None. To so hold would be to say that that individual circumstance makes defendants more eligible for death than others, a distinction the statute does not allow. Less there be any doubt that counsel for petitioner attempts to convince this Court that, statutory language and case law to the contrary, the true and exclusive factor that Arizona courts rely upon to impose death is especially cruel, heinous or depraved, respondent invites consideration of the following except from page 14 of the petition:

> Petitioner submits that even if the other aggravating factors in this case were properly demonstrated, resentencing is necessary because the one factor which elevates a "normal" first degree murder from [sic] an "abnormal" (and thus death-qualifying) murder was not constitutionally found.

(Emphasis supplied.) Undeniably, petitioner is saying that only the establishment of Ariz.Rev.Stat.Ann. § 13-703(F)(6) will result in imposition of death (the one factor that is "death qualifying") regardless of additional aggravating factors, in this case, two. That is neither factually nor legally correct. Any of the seven factors listed in Ariz.Rev.Stat.Ann. § 13-703(F) makes a defendant eligible for death, indeed, mandates it, unless the defendant produces sufficient mitigation.

Petitioner lists four cases in which the death penalty was sustained on factors other than especially cruel, heinous, or depraved. Petition, page 6, n.1. He omitted the following cases: State v. Britson, 130 Ariz. 380, 636 P.2d 628 (1981); State v. Smith (Sylvester), 125 Ariz. 412, 610 P.2d 46 (1980); State v. Evans, 120 Ariz. 158, 584 P.2d 1149 (1978), affirmed after remand, 124 Ariz. 526, 606 P.2d 16 (1980). That makes seven cases sustained on appeal that do not contain the factor of especially cruel, heinous or depraved. In addition, the Arizona Supreme Court has sustained convictions in three other cases in which the trial court imposed death on the basis of a single circumstance -- not Ariz.Rev.Stat.Ann. § 13-703(F)(6) -- but has remanded those for resentencing for other reasons. State v. Hensley, No. 5556 (Ariz.Sup.Ct., June 30, 1983); State v. Smith (Roger), ___ Ariz. ___, 665 Ariz. 995 (1983); State v. McMurtrey, ___ Ariz. ___, 664 P.2d 637 (1983). Petitioner does not inform this Court that, of

those cases involving Ariz.Rev.Stat.Ann. § 13-703(F)(6), all but five involved additional aggravation, usually prior convictions for violent crimes (as in petitioner's case) and the motive of pecuniary gain. See, e.g., State v. Harding, No. 5587 (Ariz.Sup.Ct., Sept. 6, 1983); State v. Adamson, ___ Ariz. ___, 665 P.2d 972 (1983); State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800, supp. opinion, 135 Ariz. 89, 659 P.2d 642 (1983); State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 102 S.Ct. 2259 (1982); State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980); State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980); State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980). Of the more than fifty people on death row, only five have had their sentences affirmed upon the sole basis of Ariz.Rev.Stat.Ann. § 13-703(F)(6). State v. Lambright, No. 5594 (Ariz.Sup.Ct., Sept. 28, 1983); State v. Smith (Robert), No. 5595 (Ariz.Sup.Ct., Sept. 28, 1983); State v. Jeffers, ___ Ariz. ___, 661 P.2d 1105 (1983); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Knapp, 127 Ariz. 65, 618 P.2d 235 (1980). So much for the argument that the Arizona Supreme Court affirms the death penalty in exclusive reliance upon that one circumstance.

Petitioner could have given this Court an accurate description of the basic criteria utilized by the Arizona Supreme Court on review by stating that that court will not affirm a death sentence unless, either the circumstances of the murder set it apart (the only criteria Richmond mentions), or the record and character of the defendant set him apart from other murderers. State v. Richmond, ___ Ariz. ___, 666 P.2d 57, 67-68 (1983) (Justice Cameron's

concurring opinion); State v. Zaragoza, 135 Ariz. 63, 68, 659 P.2d 22, 27-28 (1983); State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943-46 (1981). It was Richmond's prior record for violence, another first-degree murder and armed kidnapping, that prompted Justice Cameron and Vice Chief Justice Gordon to concur with Holohan and Hays that death was appropriate. 666 P.2d at 67-68.

Finally, petitioner notes four cases in which the Arizona Supreme Court set aside the trial court's finding of Ariz.Rev.Stat.Ann. § 13-703(F)(6) and imposed life sentences. In two of those cases, the Arizona Supreme Court found no aggravating circumstances, thus, there was no statutory basis for sustaining death. State v. Madsen, 25 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). In State v. Watson, supra, the court sustained two of four factors. Both factors were based on a robbery Watson committed. In the last case, the Arizona Supreme Court upheld one aggravating circumstance, a conviction for possession of marijuana for sale, and determined that the defendant suffered from a neurological lesion that was a "major contributing cause of his conduct." State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

It is within the foregoing context, especially in view of the fact that the Arizona Supreme Court unanimously agreed about the existence of two additional aggravating factors in petitioner's case, that this Court should consider petitioner's arguments.

B. Disagreement about whether a particular set of facts satisfies a circumstance is not tantamount to proof that the circumstance is unconstitutionally vague.

Although petitioner divides this argument into two parts, he says the same thing in both. He claims that because there was disagreement among the Arizona justices about whether the facts of this case fell within the ambit of Ariz.Rev.Stat.Ann. § 13-703(F)(6), that makes the "application" of that circumstance unconstitutional. The second point he asserts is that that circumstance is vague. This he purports to demonstrate by showing the "history" of its application in his case. Petition at 12. This second proposition is simply the first one restated. Both premises hinge upon whether disagreement about what the facts show renders unconstitutional the statutory definition of especially cruel, heinous, or depraved.

Petitioner has already defeated his argument by earlier emphasizing the continuing unanimity of the Arizona Supreme Court in defining and applying this circumstance. He has told this Court more than once that his case is unique because it is the only one where justices have not agreed about applicability of this particular circumstance. Petition at 5-7. The Arizona Supreme Court has considered at least 29 cases involving this circumstance, and has either unanimously upheld or rejected it. This indicates vagueness? The Court will note that petitioner never attacks the definitions developed by the Arizona Supreme Court; he simplistically equates differing interpretations of the facts with unconstitutional statutory vagueness. That is a nonsequitur.

None of the five Arizona justices disagreed that the murder involved ghastly mutilation of the victim. Evidence

showed that petitioner drove a car over Crummett's skull, then, 30 seconds later, from another direction, drove over his chest. The point of dissension between the two justices who found the circumstance applicable and those who did not was whether the facts supported the inference that Richmond knew the first pass killed Crummett and made the second run for the express purpose of mutilating the corpse. Two justices believed that a supportable inference from the facts (especially considering the 30-second interval and the fact that the car ran over the victim from different directions), and three did not. 666 P.2d at 64, 68. In previous cases involving mutilation, the record left no doubt that the defendants either inflicted great pain upon the victims before they died, or knew their victims were dead and continued to inflict gratuitous violence. See, e.g., State v. Gerlaugh, supra; State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980). Neither the concurring opinions nor the dissenting opinion indicates disagreement about the definition of Ariz.Rev.Stat.Ann. § 13-703(F)(6), only a difference about Richmond's knowledge and state of mind when he drove over Crummett the second time. Upon the facts, either position is sustainable.

DISAGREEMENT OVER FACTS

The Arizona Supreme Court has taken great care in defining and applying this particular circumstance, especially mindful of this Court's holding in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, 9-12 (1983); State v. Ortiz, supra. Godfrey, supra, has no bearing upon this case. There, the Georgia Supreme Court had evolved a limited definition of a roughly similar circumstance that restricted application of it to instances

of aggravated battery or torture upon live victims. This Court reversed because the state conceded Godfrey's victims died instantly from shotgun blasts to the head:

> The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases.

446 U.S. at 432, 100 S.Ct. at 1767. There was no room, as in this case, to draw different inferences from undeniable facts because of the restrictive definition Georgia had placed upon that particular circumstance. A second important consideration is that the Georgia Supreme Court had affirmed the death penalty relying exclusively upon that circumstance. Here, there are two additional aggravating factors not disputed by any member of the Arizona Supreme Court or petitioner. Justice Stewart noted that Godfrey intimated no authority for cases that could be sustained upon other aggravating factors. Id. at 432, n.15, 100 S.Ct. at 1767, n.15.

Even if one could characterize, merely arguendo, the conclusion of the two justices who found Ariz.Rev.Stat.Ann. § 13-703(F)(6) applicable as an error of state law, "mere errors of state law are not the concern of this Court, . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983). When, as here, the death penalty is easily sustainable upon the prior record of the defendant as exemplified by two additional circumstances, this Court should deny the writ. Neither the trial court nor the Arizona Supreme Court considered inadmissible evidence; surely the method of murder is a proper area for inquiry. Since even total elimination of

this one circumstance would not change the result, the Court should deny the writ. Barclay v. Florida, supra; Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Petitioner invites this Court to engage in a case-by-case comparison to see with which group of Arizona justices it might agree upon the facts of this case. Rejecting a similar invitation, the Eleventh Circuit aptly said:

> In regard to the judge's consideration of aggravating circumstances, Adams faults the judge for finding the murder "especially heinous, atrocious, or cruel." In upholding the trial judge's finding, however, the Florida Supreme Court properly noted that Adams had killed his victim "by beating him past the point of submission and until his body was grossly mangled." Adams v. State, 341 So.2d at 769. Although Adams argues there are Florida cases with similar facts which were not held to be "especially heinous, atrocious, or cruel," it is not the role of the federal courts to make a case-by-case comparison of the facts in a given case with other decisions of the state supreme court. Ford v. Strickland, 696 F.2d at 819; Spinkellink v. Wainwright, 578 F.2d 582, 604-05, cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983). This Court should likewise decline, especially when petitioner has conceded the uniform definition and application of this circumstance and wishes this Court to "referee" a disagreement both sides of which find support in irrefutable facts.

C. The trial court considered the proffered mitigation and did not find it persuasive.

This entire argument may be capsulized by stating that petitioner complains that the trial court had to believe his mitigation, and, more importantly (by implication, at least), was obliged to conclude his proffered mitigation

outweighed the aggravation. No decision of this Court has ever so held. This Court has said the sentencer must consider, not that he must believe, and certainly not that he must assign a particular weight to the defendant's evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Petitioner again distorts the record by saying that the question is whether the sentencing judge can impose death when he "fails to consider, as a mitigating factor uncontradicted evidence . . . ." and "the sentencing judge could somehow disregard the evidence and fail to take it into account in assessing the propriety of the death penalty." Petition at 15 (emphasis added). In view of the record, such assertions are nonsense. The trial court listened to and considered extensive testimony from petitioner and a host of others about his alleged change of character. The trial court simply was not convinced of that change, or, at the very least, that such a change was sufficient to overcome the aggravation. The plurality opinion, noting that the trial court observed all witnesses, had no difficulty in sustaining the trial court's refusal to find the evidence persuasive. State v. Richmond, 666 P.2d at 65-66. But it is clear that the trial court did consider the proffered mitigation.

Petitioner's argument amounts to nothing more than asking this Court to reevaluate the record, believe his mitigation, and conclude that it does outweigh the aggravation. Indeed, petitioner flatly asks this Court to reduce his sentence to life. Petition at 13. If this Court is going to determine the credibility of witnesses and evidence in state proceedings, perform an independent weighing process and proportionality review for every state

death penalty case, perhaps it would be more appropriate and expedient for Congress to enact preemptive legislation stripping state tribunals of appellate jurisdiction in these cases and channeling them all directly to this Court. With regard to federal habeas corpus proceedings brought by state prisoners, this Court has made it clear that it is not the province of federal courts to reassess the credibility of witnesses and testimony the state trial court heard first hand. Maggio v. Fulford, ___ U.S. ___, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983); Marshall v. Lonberger, ___ U.S. ___, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). See also United States v. Oregon Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed.2d 978 (1952).

As he must, petitioner emphasizes Justice Feldman's dissent and tries to analogize his case to that of the defendant in State v. Watson, supra. The only observation to make about Feldman's dissent is that he believed -- without seeing any witness testify -- the proffered mitigation and thought it warranted a life sentence. The four remaining justices did not. Dissent among an appellate tribunal is hardly novel. The four justices who concurred in the imposition of the death penalty were aware that the defendant in State v. Watson, supra, had presented similar testimony about changed character. They were also aware that Watson had not been convicted of another first-degree murder. 666 P.2d at 66, 68-69. That those four justices, in weighing all factors, arrived at a different assessment from that of Justice Feldman, presents no federal question.

D. Affirmance of the death penalty by a less-than-unanimous appellate court does not violate the Sixth and Fourteenth Amendments.

Offering a novel argument, Richmond likens appellate review to those states that require a unanimous jury recommendation of death. If he had been sentenced by the Arizona Supreme Court, he muses, he could not have received the death penalty because one justice dissented. His argument overlooks two elements: (1) This Court has never said, even in death penalty cases, that a unanimous guilt or sentencing jury is constitutionally required. In upholding cases involving nonunanimous guilt verdicts, the Court has noted that state provisions for unanimous verdicts in capital cases serve a rational purpose, but it has never held that unanimous sentencing verdicts in capital cases are constitutionally mandated. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); (2) If Richmond had been sentenced by a jury immediately after a finding of guilt, that jury would have made no proportionality study (as does the Arizona Supreme Court in every capital case), nor could he have presented testimony about his model conduct in the intervening 9 years because those would not have passed. Petitioner's argument is another transparent attack upon judge sentencing, already rejected by this Court. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The state can readily see that all defendants would prefer jury sentencing because it increases their chances of persuading at least one person to dissent.

The question, however, is not jury sentencing, but appellate review. Richmond does not consider the reverse of his argument: if a unanimous jury has recommended death, should this Court draw from the penumbra of the

Sixth Amendment a new constitutional principle, to be applicable to states through the Fourteenth Amendment, that as a matter of federal constitutional law, a divided appellate court automatically nullifies a unanimous jury sentence of death? Concerned as he is with his own case, petitioner has not considered the ramifications of the Court's undertaking to do what he asks. No state has seen fit to require that its supreme court unanimously affirm a death sentence. Surely the legislatures of the 31 states that have jury sentencing were aware that their highest appellate courts would review the jury's sentence.[1] Could this be mere oversight on the part of so many state legislatures? Petitioner maintains that Arizona's constitution, which does require unanimous jury verdicts in criminal cases, contains an inherent federal violation in its application. Petition at 20. Obviously, he means -- and wishes this Court to say -- that the federal constitution demands a unanimous appellate court to uphold the death penalty, as well as a unanimous jury verdict. Why not extend the analogy to federal habeas proceedings initiated by a state prisoner under sentence of death? If the federal appeals court, en banc, cannot unanimously agree that the state permissibly imposed the death penalty, that, too, automatically reduces the sentence to life. The

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[1] In Arizona, Idaho, Montana, and Nebraska, the trial court sentences the defendant in a capital case. Florida and Alabama provide for non-binding advisory jury opinions, but the trial court decides the sentence. Ala.Code § 13A-5-46(e), 13A-5-47(e); Ariz.Rev.Stat.Ann. § 13-703(B); Fla.Stat.Ann. § 921.141(2) (West 1972); Idaho Code § 19-2515; Mont. Code Ann. § 46-18-301; Neb.Rev.Stat. § 29-2520.

possibilities are no doubt attractive to all defendants in petitioner's position.

This Court has affirmed numerous death penalties, with two justices perpetually dissenting. This presents an intriguing potentiality petitioner does not mention. States have the right to death-qualify juries to eliminate panelists unalterably opposed to the death penalty. However, most state supreme court appointments are political. The prosecution could do nothing about a state supreme court justice unwilling to impose death in any situation. If such a justice continually dissented from affirmance of capital cases, should that reduce all such cases that come before that court during the tenure of that justice to life? A positive response would make the death-qualifying process at the trial level meaningless in those states that permit the jury to decide sentence, and the trial court's judgment meaningless in those six where the trial court determines sentence. Although the question was not before this Court in those two cases, respondent notes that Justice Gunter dissented in Stephens v. State, 227 S.E.2d 261, 264 (Ga. 1976), later affirmed by this Court in Zant v. Stephens, supra, and the advisory jury in Florida recommended by a 7-5 vote that Barclay receive life. 103 S.Ct. at 3421. Nevertheless, the Florida trial judge imposed death, the Florida Supreme Court affirmed, and this Court affirmed. Barclay v. Florida, supra.

CONCLUSION

Ignoring the fact that no Arizona justice disagreed that the state had shown two aggravating circumstances, petitioner falsely alleges that the Arizona Supreme Court gives "special weight" to the one circumstance about which that court disagreed. The uniqueness of that disagreement

-- which has occurred neither before nor since petitioner's case -- emphasizes the uniformity of definition and application of that circumstance by the Arizona Supreme Court. Petitioner is clamoring that one instance of discord about the state of mind the facts estabish, implies unconstitutional vagueness.

It would be inappropriate for this Court to undertake a de novo review of the record to independently assess witnesses' credibility and to substitute its judgment for that of the trial court and the Arizona Supreme Court in balancing aggravation against mitigation. Indeed, two members of this Court would not affirm the judgment regardless of aggravation. Petitioner demonstrates no constitutional violation -- he merely wants everyone to agree with Justice Feldman.

Common sense militates against the proposition that appellate courts must unanimously affirm sentences of death.

Respondent contends that petitioner has not raised a federal question, nor shown violation of a federally protected right. The Court should deny the writ.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the appellant in the foregoing case by forwarding two (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

LAWRENCE H. FLEISCHMAN
Deputy Public Defender
45 W. Pennington, 3rd Floor
Tucson, Arizona 85701
Attorney for PETITIONER

this 20th day of October, 1983.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 20th day of October, 1983.

Elizabeth J. Bender
NOTARY PUBLIC

My Commission Expires:
July 17, 1986

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